INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and Regulations involved	2
Statement	5
Argument	6
Conclusion	9

CITATIONS

Cases:

Gould, Estate of v. *Commissioner*, 14 T. C. 414	8
Lash's Products Co. v. *United States*, 278 U. S. 175	8
Shearer v. *Commissioner*, 48 F. 2d 552	8

Statutes:

Internal Revenue Code:

Sec. 1000 (26 U.S.C. 1000)	2, 6
Sec. 1001 (26 U.S.C. 1001)	6
Sec. 1003 (26 U.S.C. 1003)	8
Sec. 1004 (26 U.S.C. 1004)	8
Sec. 1005 (26 U.S.C. 1005)	2, 6
Sec. 2400 (26 U.S.C. 2400)	7
Sec. 2403 (26 U.S.C. 2403)	3, 7
Sec. 2409 (26 U.S.C. 2409)	4, 7
Sec. 3400 (26 U.S.C. 3400)	7

Miscellaneous:

Treasury Regulations 108:

Sec. 86.17	4, 9
Sec. 86.19	4

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 528

ANTHONY D. DUKE, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Neither the memorandum findings of fact and opinion of the Tax Court (R. 3a-4a) nor the opinion of the Court of Appeals (R. 6-10) is officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1952. (R. 11.) The petition for a writ of certiorari was filed on January 2,

1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the courts below correctly held that for gift tax purposes the value of jewelry purchased by the donor-taxpayer from a retail jeweler should, in the absence of any other evidence, be measured by the cost of such jewelry to the donor-taxpayer, including the amount of the federal excise tax imposed upon the retail jeweler and passed on to the donor-taxpayer.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 1000. IMPOSITION OF TAX.
>
> (a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. * * *
>
> * * * *
>
> (26 U.S.C. 1000.)
>
> SEC. 1005. GIFTS MADE IN PROPERTY.
>
> If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.
>
> (26 U.S.C. 1005.)

SEC. 2403 [as added by Sec. 552(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687]. RETURN AND PAYMENT OF RETAILERS' EXCISE TAXES.

(a) Every person who sells at retail any article taxable under this chapter shall make monthly returns under oath in duplicate and pay the taxes imposed by this chapter to the collector for the district in which is located his principal place of business or, if he has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

* * * *

(c) In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. * * *

(26 U.S.C. 2403.)

SEC. 2409 [as added by Sec. 552(a) of the Revenue Act of 1941, *supra.*]. PENALTY FOR REPRESENTATION THAT TAX IS NOT PASSED ON.

Whoever in connection with the sale or lease, or offer for sale or lease, of any article taxable under this chapter, makes any statement, written or oral, in advertisement or otherwise, intended or calculated to lead any person to believe that the price of the article does not include the tax imposed by this chapter, shall on conviction thereof be punished by a fine of not more than $1,000.

(26 U.S.C. 2409.)

Treasury Regulations 108, promulgated under the Internal Revenue Code:

SEC. 86.17. *Gifts Made in Property.*—A gift made in property is subject to the tax in the same manner as a gift of cash, and the amount of the gift is the value of the property at the date of the gift.

* * * *

SEC. 86.19. *Valuation of Property.*—(a) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing

seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.

* * * *

STATEMENT

The facts as stipulated and found by the Tax Court (R. 3a-4a) may be summarized as follows:

On two occasions in 1947, the taxpayer purchased items of jewelry and shortly thereafter presented them to his wife as gifts. The purchases were made from a retail jeweler in arm's length transactions. The taxpayer paid a total sum of $104,400 for the jewelry, $17,400 of which represented the amount of federal retailers' excise taxes imposed upon the retail jeweler. (R. 3a-4a.)

On March 11, 1948, the taxpayer filed a gift tax return for the calendar year 1947. In this return he valued the gifts of jewelry at $87,000, the sum which he had paid, less the amount of the federal retailers' excise taxes. In determining a gift tax deficiency of $3,915, the Commissioner of Internal Revenue increased the value of the gifts to $104,400, the total sum paid by the taxpayer, in-

cluding the amount of the federal retailers' excise taxes. (R. 3a-4a.)

In contesting this deficiency in the Tax Court, the taxpayer offered no evidence of the value of the gifts other than the foregoing stipulated facts. (R. 10.)

The Tax Court and the Court of Appeals sustained the Commissioner's position, holding that under the circumstances, the value of the jewelry for gift tax purposes should be measured by its cost to the donor-taxpayer, i.e., the price paid by him, including the amount of the federal retailers' excise taxes. (R. 3a-4a, 9-10.)

ARGUMENT

Section 1000 of the Internal Revenue Code, *supra,* p. 2, imposes a tax, computed in accordance with Section 1001, upon the transfer of property by gift. Computation of the tax in accordance with Section 1001, as amended by Section 402(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, requires application of a graduated rate of tax to the amount of such gifts. Section 1005 of the Code, *supra,* p. 2, further provides that, if the gift is made in property, the amount of the gift shall be its value at that time.

It is not disputed that the only evidence of the value of the gifts of jewelry in the instant case was the price which the taxpayer paid for such jewelry a short time before the gifts were made. In stat-

ing the question presented, the taxpayer assumes, however, that the retail price paid for the jewelry did not include the amount of the federal retailers' excise tax. (Pet. 2.) The taxpayer accordingly contends that the decisions of the courts below in effect uphold the imposition of a tax upon a tax. (Pet. 3-4.) This position, we submit, is based upon a fundamental misconception of the nature of the federal retailers' excise tax.

Section 2400 of the Internal Revenue Code, as added by Section 552(a) of the Revenue Act of 1941, imposes an excise tax on jewelry sold at retail. It is not a tax imposed upon the buyer for the privilege of buying; it is rather a tax imposed upon the seller for the privilege of selling, and it is the person who sells at retail who is required by Section 2403(a), *supra*, p. 3, to file returns and to pay the tax. The pattern of this tax is the same as that of the manufacturers' excise tax imposed by Section 3400 and subsequent sections of the Code. It is well settled that the incidence of such a tax is on the seller and that, when the economic burden of the tax is passed on to the purchaser, it becomes not a tax upon the purchaser but merely a part of the total purchase price,[1] or cost, of the article to

[1] In the case at bar the error in the taxpayer's assumption that the retail price paid for the jewelry did not include the federal retailers' excise tax is even more apparent when considered in connection with Section 2409 of the Code, *supra*, p. 4, which imposes a fine on a retailer who represents that the sales price of the article does not include the tax.

such purchaser. *Lash's Products Co.* v. *United States,* 278 U. S. 175; *Shearer* v. *Commissioner,* 48 F. 2d 552 (C. A. 2d). In this case, therefore, the taxpayer did not pay the federal retailers' excise tax as such but rather an increased purchase price due to the passing on of the economic burden of that tax; consequently, when he elected[2] to measure the value of his gifts of jewelry by their retail purchase price, a corresponding increase was reflected in his gift tax but he did not pay a tax upon a tax.

After pointing out that the issue here involved has been litigated but once before in *Estate of Gould* v. *Commissioner,* 14 T. C. 414, where it was decided in the same manner, the taxpayer asserts that the question presented is of importance to taxpayers generally. Whether the paucity of litigation is due to the exclusions and exemptions allowed by Section 1003(b) of the Internal Revenue Code and Section 1004(a), as amended by Section 455 of the Revenue Act of 1942, c. 619, 56 Stat. 798, or to the fact that the value of gifts need not be proved by their cost to the donor, it seems clear, however, that the question is not a frequently recurring one.

For the reasons stated by the Court of Appeals, its decision is clearly correct. Moreover, it might

---

[2] The taxpayer, as the Court of Appeals pointed out (R. 10), "did not show, by introducing an expert's testimony or otherwise, that the amounts he paid for the jewelry exceeded the jewelry's worth."

also be noted that if the taxpayer in the case at bar had given his wife the money to buy the jewelry, $104,400 is the amount which he would have had to give her. The amount of the gift in that case would unquestionably have been $104,400. It should make no difference for gift tax purposes whether the taxpayer gave his wife the gift itself or the money to buy it. See Section 86.17, Treasury Regulations 108, *supra,* p. 4.

CONCLUSION

The decision below is correct. There is no conflict in decisions and no other reason appears which would warrant further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

WALTER J. CUMMINGS, JR.,
Solicitor General.

CHARLES S. LYON,
Assistant Attorney General.

ELLIS N. SLACK,
JOSEPH F. GOETTEN,
Special Assistants to the Attorney General.

JANUARY, 1953.

☆U.S. GOVERNMENT PRINTING OFFICE 1953—239312/P.O. 1040